

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CLERK'S OFFICE U.S. DIST. COURT
AT LYNCHBURG, VA
FILED
JUN 12 2007
JOHN F. CORCORAN, CLERK
BY: *[Signature]*
DEPUTY CLERK

GREGORY S. DUNCAN,

Plaintiff,

v.

GE CONSUMER FINANCE, INC.
d/b/a GE MONEY BANK,

Defendant

CIVIL No. 3:06cv00062

MEMORANDUM OPINION and ORDER

JUDGE NORMAN K. MOON

This matter is before the Court on Plaintiff's Amended Motion for Default Judgment, filed on June 8, 2007 (docket entry no. 9). Plaintiff has moved this Court to: 1) enter default judgment on his first and third causes of action; and, 2) if such motion is granted, dismiss without prejudice his remaining causes of action. For the following reasons, Plaintiff's motion will be DENIED.

Plaintiff seeks default judgment on his first and third causes of action. It appears in the record that proper service has been had and that Defendant has failed to make any defense within the time provided by law.

Under Rule 55(a) of the Federal Rules of Civil Procedure, a party's default may be entered by the clerk when a defendant has failed to plead or otherwise defend. *See* Fed. R. Civ. P. 55(a). Defendant's default was properly entered by the Clerk of this Court on March 7, 2007. (*See* docket entry no. 6) Under Rule 55(b)(2), a plaintiff may subsequently move for default judgment to be entered by the court, provided that the plaintiff has filed, among other documents, an appropriate affidavit as to the amount due from the defendant to the plaintiff. *See* Fed. R. Civ.

P. 55(b)(2).¹

Here, the record contains evidence of the damages claimed by Plaintiff, but Plaintiff has failed to submit this evidence in the form of an affidavit as required by Rule 55. Pursuant to this Court's order issued on May 25, 2007 (docket entry no. 9) denying Plaintiff's motion for default judgment, Plaintiff amended his motion to include a declaration of his damages (Pl.'s Mot. Default J. Ex. 1) as well as his attorney's declaration of fees and expenses (Pl.'s Mot. Default J. Ex. 2). In order for this Court to grant default judgment without a hearing, this information must be provided in *affidavit* form.² Once Plaintiff files the appropriate affidavits, he may again resubmit the matter to this Court for entry of default judgment.

Plaintiff is entitled to recover reasonable attorneys' fees under both 15 U.S.C. § 1640(a)(3) and Virginia Code § 6.1-309. I will evaluate the reasonableness of the fees upon receipt of the appropriate affidavits.

Plaintiff requests dismissal without prejudice of his remaining causes of action in the event that default judgment on his first and third causes of action is granted. Because the Court is not prepared to grant default judgment, the Court will not consider Plaintiff's motion for conditional dismissal. However, under Rule 41 of the Federal Rules of Civil Procedure, Plaintiff may voluntarily dismiss his remaining causes of action by his own stipulation, and does not need the permission of this Court. *See* Fed. R. Civ. P. 41(a)(1).

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order and

¹ Although Rule 55(b)(2) is unclear, an affidavit of the amount due is required when a plaintiff is seeking the court's entry of a judgment by default. *See Fisher v. Taylor*, 1 F.R.D. 448, 448 (E.D. Tenn. 1940).

² An affidavit is sworn before an officer authorized to administer oaths, whereas a declaration is not. *See Black's Law Dictionary* (8th ed. 2004) (defining "affidavit" as "a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public" and defining "declaration" as "a formal statement, proclamation, or announcement, esp. one embodied in an instrument.")

Opinion to all counsel of record.

ENTERED:

Stannard Mon

United States District Judge

June 12, 2007

Date